[TRANSLATION]

CUSTOMARY LAW AND THE DOCTRINE OF THE JURISTS IN THE FORMATION OF INDIAN LAW

The study of Indian law, from an external point of view, has an undeniable importance. By virtue thereof, one may follow the origin and transformation of the political design which has inspired legislation; and its theoretical character and its impossibility in practice. He may observe the peculiar methods which have been imprinted on it by customs and the period. He may glimpse its modest beginnings, its gradual development, its vigorous enrichment as an instrument of government. From it he may infer the ignorance of or insight into geographical, ethnological, political, and economic knowledge of colonial empire. It shows the orientation of the studies of law and the possible influence exercised on the compilation of the law by historians and jurists. Finally, the study of all these organisms which are productive of judicial rules is indispensable, for each of them reflects multiple aspects of a living law rich in its contents. The notion of the historical process of this law is fundamental. Institutions and customs which are not given place in the *Recopilación* of 1680 (which only inserts those laws that were in force) were authorized by preceding laws, afterwards abolished; but the institutions and customs still had a vigorous existence at times, notwithstanding the orders of new laws to the contrary.

Hence arose the very important position held by customary law in America, for it can be said of it that it constitutes an entire body of positive law, formed naturally and spontaneously behind the legislation which was enacted.

In the first place it is fitting to say that native law survived after the Spanish conquest and inspired Indian legislation more than is commonly admitted. The development of such a topic would compel us to depart from our principal theme, which consists in calling attention to the background of customs and juridical and social practices of the aborigines which served as the foundation for the Hispanic American political and social organization. When speaking of Spanish authorities in Peru, Matienzo recommended that governors should not undertake

to change customs suddenly and to make new laws and ordinances before knowing the condition and customs of the natives of the land and the Spaniards living there, for since the land is extensive it has many different customs just as it has

many different climates. One must first reconcile the customs of those who wish to govern and act as they please, so that after having obtained their good will, he may by means of his authority make them change their customs. But if one were to try to put a sudden end to the drunkenness of the Indians living in Potosí, they would resist, and if one should try suddenly to order the caciques not to tyrannize over their Indians, some harm might result from such an action.[1]

And the learned magistrate added "He who rules must be exceedingly prudent."

The vast influence exercised by the rule of the customs of the natives of America is explained, if one keep in mind that not a few of the institutions created by Spain are substantially related to typical models of the organization of the Indians. It is superfluous to mention that the *Mita* is an aboriginal institution. The tributary system imposed on the Indians by the Spaniards was built up on the foundation of the existing organization. And when, perhaps, the proof of which is today being attempted, the "provinces" into which the "huno" of Peru was divided, were districts which were later converted into encomiendas.[2]

Customary law found in the Indies an acknowledged legal force in many cases although the express text of the *Ley de Toro* (which it was ordered should be observed in defect of the legislation of the Indies) commanded that the ordinances and pragmatics must be applied without any authority alleging "that they are not observed and kept."[3]

[1] *Gobierno del Perú*, edition of the Faculty of Philosophy and Letters, Buenos Aires, 1910, p. 118.

[2] *Observaciones sobre la organización social del Perú antiguo*, by E. Zunkalowski, Lima, 1919.

[3] Laws IV, V, and VI, título II. of the first *Partida* treat of customs and manners. Berni admits that custom "either is an interpretation of the law, or contrary to the law, or in the absence of law (*Apuntamientos sobre las Leyes de Partida*, Valencia, 1759, I. 13). "The custom which interprets the law, does not require the notice of the prince, and can not be extended from case to case nor from place to place," adds the author above cited. It is admitted that in the absence of law, custom has the force of law. Bovadilla asserted that custom "puts to silence the laws and rescripts of princes", and concluded by saying that sentence had to be passed in accordance with custom if the law had no derogatory stipulation, "and in case that it has such a stipulation, it shall be understood as annulling past but not future custom, or any custom to be introduced, for this has the force of annulling the law, according as is declared by a law of the *Partida*, to the following effect: 'and it is even very powerful, for it takes precedence of old laws that might have been enacted before it'." (*Politica para corregidores*, Madrid, 1775, book III. chapter VIII. numbers 195 and 196.)

King Philip IV., by a decree of September 29, 1628 (ley XXI., tít. II., of the *Representación*) defined the necessary conditions to be met by the custom to which the royal grants might refer.[4]

Solórzano alludes upon various occasions to Indian customary law and exalts its importance. The illustrious jurist believed that the good legislator "must conform his precepts to the regions and peoples concerned, and to their temperament and capacity", and "by his industry and humanity", he ought "to consider and provide what may be advantageous for them, as the most advantageous thing for them, as Cicero gravely counseled his brother, when the latter occupied the viceroyalty of Asia". Based on the modern idea of objective and historical law, Solórzano considered that "the customs of each region are usually no less different than the airs which bathe them and the bounds which separate them";[5] and he bewailed the fact "that men so learned and prudent should utter with no effort so great generalities."[6]

Solórzano especially invokes the practices of customary law, attributing to them a legal force, when they concerned the services that might be rendered by the Indians,[7] in the case of one elected for a church which he administers until he is confirmed,[8] and with respect to certain customs of merchants and traders of the Indies.[9]

A careful search in the judicial archives of the colony might furnish excellent materials for estimating the application of customary law in the magistracy of the Indies. The importance possessed by this law in commerical activity is known. The merchants of Río de la Plata, for instance, refused to pay the alcabala duty in 1808, on the ground that "the usages and customs introduced by long continued use and sanctioned by consent of the authorities have always had a very preferential place in the national codes". After citing the laws of the *Partida*

[4] "Whenever it shall be our will," says the above cited law of the *Recopilación de Indias*, "to conform ourselves, after consultation, with that which appears to be custom: we declare that this shall not be understood in two or three acts only, but in many continued acts, without interruption or order to the contrary. And in order that the awards that might be made by us under this pretext may have effect, they must be founded on settled custom, established without alteration or prohibition to the contrary and by many acts of the same kind which confirm it."

[5] *Politica Indiana*, Antwerp, 1703, p. 109.

[6] *Ibid.*, p. 127.

[7] *Ibid.*, p. 76.

[8] *Ibid.*, p. 273.

[9] *Ibid.*, p. 524.

cited above, which treat of customary law, the petitioner concludes by saying "Hence it comes about that custom is as sacred and as worthy of respect and observation as is the will itself of the legislator."[10]

If not the origin, at least the vigorous existence and continuous functioning of some colonial institutions, such as open cabildos, are explained only through customary law. According to Bovadilla, usage had determined the meeting in open council in the smaller towns. In the *Recopilacion de Leyes de Indias* (Ley II., tit. XI., lib. IV., royal decree of Philip IV. of November 23, 1623), open cabildos are only mentioned in noting the prohibition of electing procurators of the city from their own midst. Besides recognizing their existence, it does not appear that the law prohibits anything else to open cabildos. . . . It is a fact that during the three centuries of Spanish domination, open cabildos were held in the larger and smaller towns. Buenos Aires, of the sixteenth century or of the eighteenth—when it had scarcely one thousand inhabitants or when its population exceeded 40,000—summoned a portion of its citizens together in order to consult them regarding non-essential matters or about important economic and political questions. It is impossible to study the life of the organism of open cabildos through the variations of legislation or by means of the aid of science, because of the insufficiency of such data, although these do furnish the elemental data for the explanation of its origin. On the other hand, this study ought to be completely possible by observing the working of the organism which approximates to the living phenomenon.

In regard to the scientific doctrine of studious persons especially versed in the law of the Indies, it is not running any hazard to establish the fact that the legislation enacted for America at the end of the XVI. century and until the appearance of the *Recopilación* at the end of the XVII. century, is entirely the work of jurists and historians, and that the fundamental reforms of the XVIII. century were in large measure counseled by statesmen and economists, during a period in which the increased study of native law was promoted. It is not in point to make mention at this time of the legislative work of Juan de Ovando, Diego de Encinas, Aguiar y Acuña, Pinelo, and Solórzano, which was to be perpetuated in the *Recopilación* of 1680; or of the labor of Uztariz, Marquis de la Ensenada, Ward, Ulloa, Rubalcaba, Campomanes, Jovellanos, who projected vast reforms of an economic

[10] Archivo general de la Nación, "Hacienda", legajo 137, expediente 3467.

nature in the Indian legislation of the XVIII. century.[11] But we desire to point out with respect to the Indian jurists that aside from having given an impulse to the elaboration of the law of the New World, they intervened effectively in its renovation, improvement, and progress.

As men trained in the law, they affirmed the need of establishing in the colonies an orderly and well considered administration, a technical management, and a judicial government instead of one built on force.

Matienzo and Solórzano considered that the viceroys of the New World ought to take counsel from the men "who are of that land and have most experience".[12] They thought the government of Indian society to be complex, where there are experienced

> sudden and dangerous changes, where municipal laws are ignored, and there are not enough laws for all cases, and whether we desire to make use of Roman or Castilian laws, these are at variance with those which the natives observed formerly.

The above mentioned jurists asserted that there ought to be sent to the New World as viceroys "men trained in the law who are versed and experienced in the supreme councils", instead of "military and titled men".

Among all jurists the work of the illustrious Juan de Solórzano Pereyra should inspire generous esteem among Americans.

Solórzano, in fact, figures among the few writers who defended the "creoles" warmly, exalted their virtues and capacity, and proclaimed the need of recognizing them as equal to Spaniards before the law. Almost all of chapter XXX. of book II. of *Política Indiana* is a brief in favor of those of whom Solórzano said that "it can not be doubted that they are true Spaniards". He adduces many reasons

> to demonstrate the ignorance or evil intention of those who refuse to the creoles any share in the rights and prerogatives of Spaniards, taking as their excuse that the former degenerate so much because of the climate and temperature of those provinces that they lose whatever good influence the Spanish blood may have on them, and scarce will they esteem them worthy the name of rational beings, just as the Jews of Jerusalem and Palestine were wont to do, who considered as barbarians and despised those who were born or lived among Gentiles. . . . [13]

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[11] On these points, see our volumes *Notas para el Estudio del Derecho Indiano* (1918), and *"La Política Economía de España en América y la Revolución de 1810* (1914).

[12] *Politica Indiana,* p. 447.

[13] *Ibid.*, p. 127.

Such an attitude on the part of Solórzano, not only meets with a response from the American heart, but also infuses respect for his intelligence and power of thought; for it shows that the wise jurist was possessed of a spirit that could pierce the then far distant future, which as time went on would bring about the struggle between the governing minority and the immense social mass of those born in the country.

Solórzano explains that those who especially took it upon themselves to discredit the creoles were the Spanish prelates who tried to exclude them from the dignities and honorable charges of their orders; while a bishop of Mexico raised the question whether creoles could be ordained as priests or not. To Father José de Acosta, who said of the creoles "that they feed on the milk of vices and the lusts of the Indians", Solórzano replied by noting the immensity of these territories and their differences, and the differences of the natives among themselves, thus contradicting that bold and absolute assertion, and affirming on the others hand, that in many ways, the creoles "were reared very temperately and self restrained". He contemplated with a lofty and apostolic spirit the lot of other men, and added:

> Besides, just as roses grow amid thistles and thorns, and just as many of the wild beasts become tame, so also there is no land, however incongruous it be and however bad its climate, that has not often given and which does not often give men who are remarkable and worthy for their virtues, arms, or letters. . . . [14]

After testifying to the existence of many creoles

> who have been illustrious for their arms and letters, and what is of more importance, in the solid part of heroic, exemplary, and prudent virtues, of whom I could easily make a lengthy list,

he concludes by protesting against the bad opinion that had been scattered in regard to them, and of the injustice and injury which had been done them by refusing them the exercise of equal rights with

[14] More fervently, if that be possible, Solórzano defended the Indians. He has some wonderful pages devoted to this matter in books II. and III. Not only did he act as advocate for them in his writings; he was an upright judge who punished the excesses of encomenderos without mercy and without fear, as under the following sentence: "Let those who by fraud covet what is another's be deprived of their own things; and let them be ashamed to take from those poor people to whom they ought to give and whom they ought to protect, in order to become rich on their scanty substance" (*Politica Indiana*, p. 224).

the Spaniards. Consequently, with such a beginning, he proclaims the advantage of giving the preference to those born in the Indies in the provision of offices, when it is a question of equal merit. Referring especially to the offices of the Church and of Benefices, he laments in the name of the creoles, and citing various authorities, "that notwithstanding any merits they might possess, not even a gnawed bone was given them".[15] Then he relates the reasons aiding him in deciding that the preference should be given to the natives, referring "to the greater love they will bear to the land and to the country where they were born" and to the fact that

> creoles very seldom obtain in Spain any reward for their studies, merits, and services, and if they should also perceive that they are deprived of those rewards which they might hope for in their own lands, and that these are obtained by those who come from other lands, they might fall into such a condition of desperation that they will hate virtue and studies.[16]

He ends by saying—an audacious assertion for his epoch—that some of the offices of the Supreme Council of the Indies ought to be filled with natives of the Indies, or at least by persons who had served many years in the *audiencias* of the Indies.[17]

In 1646, Solórzano finished his learned work, which is a monument of Indian law and history.

A studious man and a historian of vast sweep, the advanced intellectual clear sightedness of Solórzano explains the profound influence which he exercised on the spirit of the revolutionary generation of America at the end of the XVIII. century.

On the most conspicuous representative of that generation in la Plata, Mariano Moreno, the readings and commentaries of the *Social Contract* of Rousseau and the *Política Indiana* of Solórzano had perhaps an equal political influence.

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[15] *Politica Indiana*, p. 345.
[16] *Ibid.*, p. 345.
[17] *Ibid.*, p. 463.